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IN THE

Supreme Court of the United States

October Term, 1994

JAMES B. MAYNARD,

Petitioner,

V.

NORFOLK AND WESTERN RAILWAY COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ABINGDON DIVISION

JAMES B. MAYNARD
Plaintiff,
v. CIVIL ACTION NO. 92-0163-A
NORFOLK AND WESTERN RAILWAY COMPANY,
Defendant.

MEMORANDUM OPINION

This federal questions case is before the Court on crossmotions for partial summary judgment. Having reviewed the briefs submitted by both parties to the action, this Court considers these motions ripe for decision. Jurisdiction to decide this matter rested with the Court under 28 U.S.C. 1331.

FACTS

On November 1, 1990, the plaintiff, James Maynard ("Maynard"), reported to his job as a locomotive engineer with the defendant, Norfolk and Western Railway

Company ("N&W") at the defendant's Richlands rail yard. Maynard went to his assigned engine and attempted to enter the cab through a door on the short hood end. Maynard was unable to open the door and was injured in his attempt to open it. Maynard then proceeded to the other side of the engine where he entered the cab through the door on the long hood end.

Once in the cab, Maynard inspected the short end door and determined that it was stuck due to a faulty door sealing gasket. The engine was subsequently removed from service due to the faulty door. Maynard brought suit against N&W claiming damages resulting from violations of the Federal Employers' Liability Act, the Safety Appliance Act, and Boiler Inspection Act.

Maynard then filed a motion for summary judgment on the basis of his claim

under the Boiler Inspection Act. Plaintiff claims there is no material factual dispute over the fact that the door on the short hood end was damaged and "unsafe". Maynard claims this fact entitles him to summary judgment on the issue of defendant's liability.

N&W responded by filing a motion for partial summary judgment based on the Safety Appliance Act and the Boiler Inspection Act. Defendant maintains that the plaintiff is not entitled to summary judgment on his Boiler Inspection Act claim since the locomotive was not "in use on its line". [1] Defendant further claims that since

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1 § 23 Use of unsafe locomotives and appurtenances unlawful; inspection and tests
It shall be unlawful for any carrier to use or permit to be used on its line by locomotive unless said locomotive, its boiler, tender and all parts and appurtenances thereof are in proper condition and safe to operate in service to which the same are put, that those may be employed in the active service of such carrier without peril to life or limb, and unless said

the locomotive was not "in use on its line", there can be no violation of the Boiler Inspection Act, and therefore, N&W is entitled to summary judgment on the Boiler Inspection Act claim. Defendant also asserts that the Safety Appliance Act does not apply to doors on rail cars or engines and summary judgment should be granted to the defendant on that claim.

Maynard responded to defendant's motion by indicating a desire to forego prosecution of the Safety Appliance Act claim, but maintaining that the Boiler Inspection Act claim entitles him to relief. Plaintiff claims the engine was "in use on its line" at t he time of the

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locomotive, its boiler, tender, and all parts appurtenances thereof have been inspected from time to time in accordance with the provisions of sections 22 to 29 and 31 to 34 of this title and are able to withstand such tests as may be prescribed in the rules and regulations hereinafter provided for.

injury and that the door was "unsafe".

DISCUSSION

In its motion for summary judgment the moving party has the initial burden of coming forward and identifying which "pleadings, depositions, answers to interrogatories, and admissions on file, together with any affidavits, if any," demonstrate that there is no genuine issue as to any material fact. Fed. R. Civ. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). Once this initial burden is satisfied, the non-moving party must"go beyond the pleadings" and demonstrate the specific facts that show "there is a genuine issue for trial." Id. at 324. If, upon evidence presented to the court, there is no genuine issue of material fact in dispute, the moving party is entitled to judgment as a matter of law. Anderson v.

Liberty Lobby, Inc., 477 U.S. 242, 247 (1986).

A. Safety Appliance Act

This Court finds itself in an unusual situation with regards to plaintiff's Safety Appliance Act claim. There is a motion by the defendant for summary judgment on the issue, but plaintiff has indicated that he "does not intend to pursue a Safety Appliance Act claim." *Plaintiff's Response to Defendant's Motion for Partial Summary Judgment* at 5. The Court does not view this statement as a motion to dismiss the claim, but in the event it is so intended, the plaintiff's claim based upon the Safety Appliance Act is dismissed with prejudice.

If the statement was not intended as a request for dismissal of the claim, this Court finds the defendant's position to be

persuasive on this issue. More specifically, defendant cites Jordan v. Southern Ry. Co., 970 F.2d 1350 (4th Cir. 1992), where the Court held that a door and its ratchet mechanism is not a "safety appliance" within the meaning of the Safety Appliance Act. Id. at 1351. In light of this binding authority, this Court grants N&W's motion for summary judgment as to Maynard's Safety Appliance Act claim.

b. Boiler Inspection Act

The only true issue before this Court is whether summary judgment should be granted on the Boiler Inspection Act claim. In deciding this motion the Court is faced with the central question of whether the locomotive, on which Maynard was injured, was in "use on its line" within the meaning of the Boiler Inspection Act, 45 U.S.C. 23. Because this Court finds that the

locomotive was not 'in use" within the meaning of the Act and grants summary judgment to the defendant, it is unnecessary to evaluate plaintiff's claim that the door was "unsafe".

In its motion for summary judgment the defendant asserts that because the engine was located on a side track and had not been inspected it was not"in use" at t he time of Maynard's injury. Defendant relies heavily on the reasoning in Angell v. Chesapeake & O. Ry. Co., 618 F.2d 260 (4th Cir. 1980) where the Court based its holding that the engine was "in use" on the fact that the injury occurred after the engine had been inspected and was "readied". Id. at 262. Defendant, in this case, further argues, that since the engine was cold and had not been inspected, the engine was not "readied," and therefore,

was not "in use".

Plaintiff responds that the engine had been inspected and was ready for use and that Maynard's injury occurred when he was simply trying to enter the engine, not while he was inspecting it. since, according to the plaintiff, the engine was ready for use, it was "in use" within the meaning of the Act.

As a starting point for this inquiry, the Court must decide what the uncontested facts are in this case. It is apparent that the engine which Maynard mounted was sitting on a side track and was cold. Maynard was responsible for conducting an inspection of the engine prior to taking the engine from the rail yard. At the time of his injury, Maynard has not conducted his inspection of the engine. While there are other undisputed facts surrounding the

accident, these facts are the most relevant to a resolution of this matter.

The bulk of the case law on this issue consistently holds that when an engine is undergoing repairs, servicing, or inspection, it is not "in use" and is not subject to the Boiler Inspection Act. See Angell v. Chesapeake and O. Ry. Co., 618 F.2d 260 (4th Cir. 1980); Trinidad v. Southern Pacific Transp. Co., 949 F. 2d 187 (5th Cir. 1991); Tisneros v. Chicago and N. W. Ry. Co., 197 F. 2d 466 (7th Cir. 1952). Plaintiff makes a valiant effort to distinguish his factual situation by claiming that since there are not repair or maintenance facilities at the Richlands rail yard, the engine could not be inspected, repaired, or maintained there. Maynard also claims that his injury did not result from his "inspection" of the door

but rather from his opening it.

The Court find these distinctions to be unpersuasive. It is undisputed that Maynard bore the responsibility of inspecting the engine before leaving the yard. Were Maynard to have discovered some defect in the engine prior to leaving, it would be his responsibility to report it to the proper personnel before continuing. Such is the case here. It cannot be said that the engine was "readied" prior to Mayanrd's inspection. If in fact, it was considered "readied" there would be no need for plaintiff to conduct the inspection. In fact if an inspection had been conducted, it would likely have revealed the condition of the door.

Plaintiff argues that he was not conducting an inspection and there after the engine was "in use" before he boarded.

However, there appears to be no case law which supports this position. While an engine need not be in motion to be "in use", it generally must be en route to its destination. See New York, H. H. & H. Ry. v. Leary, 204 F.2d 461, 465 (1st Cir.), cert. denied, 346 U.S. 856 (1953). Accepting plaintiff's rationale, any time an engine were away from a repair facility, even though sitting cold on a side track, would be "in use." Such is clearly not the case. Plaintiff's act of trying to open the door did not place the engine "in use" for purposes of the Boiler Inspection Act. Accordingly, summary judgment is granted to the defendant.

CONCLUSION

Pursuant to the reasoning outlined advice, this Court concludes that the Safety Appliance Act does not apply to

doors or injuries resulting from their use. This Court also finds that the engine was not "in use" within the meaning of the Boiler Inspection Act at the time plaintiff's injury occurred, and therefore, the Boiler Inspection Act is inapplicable in this case. Accordingly, summary judgment is granted in favor of the defendant on both claims.

ENTER: This _____ day of January, 1994.

SENIOR UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ABINGDON DIVISION

JAMES B. MAYNARD

Plaintiff,

v. CIVIL ACTION NO. 92-0163-A

NORFOLK AND WESTERN RAILWAY COMPANY,

Defendant.

ORDER

For the reasons set forth in the Memorandum Opinion filed this day, it is hereby

ADJUDGED AND ORDERED

that:

1) The plaintiff's claim based upon the Safety Appliance Act is hereby DISMISSED WITH PREJUDICE;

2) Defendant Norfolk and Western Railway Company's Motion for Summary Judgment, as to the Safety Appliance Act, and the Boiler Inspection Act is hereby

GRANTED;

3) Plaintiff's Motion for Summary Judgment is DENIED.

The Clerk is directed to send certified copies of this judgment and order to counsel of record.

ENTER: This _____ day of January, 1994.

_____
SENIOR UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF VIRGINIA
ABINGDON DIVISION

JAMES B. MAYNARD

V.

NORFOLK & WESTERN RAILWAY COMPANY

CASE NUMBER: 92-0163-A

(1) Was the defendant, Norfolk & Western, guilty of negligence which was a proximate case of the plaintiff's injuries, in whole or in part?

_____ or __X__
Yes No

If your answer is "NO", this is the end of your verdict. If your answer is "YES", proceed with the next question.

(2) Was the plaintiff guilty of some contributory negligence?

_____ or _____
Yes NO

If your answer is "NO", proceed to question #4; if your answer is"YES", answer questions #3 and #4.

(3) What percentage of plaintiff's injuries was caused by his own negligence?

_____%

(4) Disregarding any percentage in questions #3, if any, or any reduction due to contributory negligence, what are the total damages sustained by the plaintiff as a result of defendant' negligence?

$_____

_____ _____

FOREPERSON'S SIGNATURE DATE

UNITES STATES DISTRICT COURT
WESTERN DISTRICT OF VIRGINIA
ABINGDON DIVISION

JAMES MAYNARD

V.

NORFOLK & WESTERN

CASE NO: 92-0163-A

__X__ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tired and the jury has rendered its verdict.

___ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that plaintiff shall recover nothing from the defendant and judgement is entered in favor of the defendant and this case is stricken from the docket.

_____ _____
Date U.S. District Judge

_____
(by) Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ABINGDON DIVISION

JAMES B. MAYNARD,
Plaintiff,

v. CIVIL ACTION NO. 92-0163-A

NORFOLK AND WESTERN RAILROAD COMPANY,
Defendant.

ORDER

For the reasons announced from the bench and in light of the unanimous defense verdict delivered by a fair and impartial jury this Court finds the plaintiff's motion to set aside the verdict and for a new trial to be without merit. Accordingly, the motion is DENIED.

The Clerk is ordered to strike this matter from the docket and send copies of this order to all counsel of record.

ENTERED: this 8 day of February, 1994

SENIOR UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ABINGDON DIVISION

JAMES B. MAYNARD,

Plaintiff,

v. CIVIL ACTION NO. 92-0163-A

NORFOLK AND WESTERN RAILWAY COMPANY,

Defendant.

NOTICE OF APPEAL

Notice is hereby given that plaintiff, above named, hereby appeals to the United States Court of Appeals for the Court Circuit from Order by the Honorable Glen M. Williams denying plaintiff's Motion to set Aside the Verdict and to Grant a New Trial and entering judgment for defendant on plaintiff's claim under the Federal Employers' Liability Act, entered in this action on the 8th day of February, 1994.

JAMES MAYNARD

By: _____
Of Counsel

Otis K. Forbes, III, Esquire
Francis P. Hajek, Esquire
WILSON & HAJEK, P.C.
1294 Diamond Springs Road
Post Office Box 5369
Virginia Beach, Virginia 23455

CERTIFICATE

I hereby certify that a true copy of the aforesaid Notice of Appeal was mailed to all counsel of records this 18th day of February, 1994.

Otis K. Forbes, III

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ABINGDON DIVISION

JAMES B. MAYNARD,
Plaintiff,

v. CIVIL ACTION NO. 92-0163-A

NORFOLK AND WESTERN RAILROAD COMPANY,
Defendant.

AFFIDAVIT

I, F. R. Stepp, make the following affidavit based upon my personal knowledge and certify that I am competent to testify to the matters stated herein:

1. On November 1, 1990, I was the general yardmaster for Norfolk and Western Railway company at its Richlands, Virginia, yard. I was also one of James B. Maynard's supervisors on that date.

2. Mr. Maynard alleges an injury on the morning of November 1, 1990, at or about 2:15 a.m. At that time, Mr. Mayanrd states that he reported to work and his

assigned engine was parked by itself on the spark track of Norfolk and Western's Richlands, Virginia yard.

3. The spark track at the Richlands yard is a track designated to park locomotives on when not in use. I understand that the name originated from the days of the steam engines when there was coal-fired furnace on the engine to produce steam. The steam locomotives were brought into the terminal after a run and were parked on the spark track to shake the coal cinders out of the furnace. This process would cause sparks, and thus the track became know as a spark track. The spark track is also known as an eigne track. When the unit is on the spark track or engine track it is off the main line and is not being used.

4. As part of the job, it is the duty

of an engineer, such as Mr. Mayanrd, to make a general inspection of his engine before leaving the Richlands yard. Mr. Maynard had such a duty on November 1, 1990, with respect to the engine in question for taking it form the spark track.

F. R. Stepp

STATE OF VIRGINIA

COUNTY OF TAZEWELL

Subscribed and sworn to before me this 22nd day of December , 12993, by F. R. Stepp.

Notary Public

My Commission Expires:

UNPUBLISHED
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

JAMES B. MAYNARD,

Plaintiff-Appellant,

v. No. 94-1285

NORFOLK AND WESTERN RAILWAY COMPANY,

Defendant-Appellee.

Appeal from the United States District Court for the Western District of Virginia, at Abingdon.

Glen M. Williams, Senior District Judge.
(CA-92-163-A)

Argued: February 1, 1995

Decided: March 27, 1995

Before ERVIN, Chief Judge, NIEMEYER, Circuit Judge, and YOUNG Senior United States District Judge for the District of Maryland, sitting by designation.

Affirmed by unpublished per curiam opinion.

COUNSEL

ARGUED: Francis Paul Hajek, WILSON & HAJEK, P.C., Virginia Beach, Virginia, for Appellant. Richard Edward Ladd, Jr., PENN,

STUART, ESKRIDGE & JONES, Abingdon, Virginia, for appellee.
ON BRIEF: Otis K. Forbes, III, WILSON & HAJEK, P.C., Virginia Beach, Virginia, for Appellant. Wade W. Massie, PENN, STUART, ESKRIDGE & JONES, Abingdon, Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6.

OPINION

PER CURIAM:

James B. Mayanrd, a locomotive engineer, strained his left elbow on November 1, 1990, when he tried unsuccessfully to open a stuck cab door to Locomotive 3218, owned by his employer, Norfolk and Western Railway Company. The injury occurred at the beginning of Maynard's work day when Maynard tried to enter the cab of the locomotive, which was parked on a side track. He sustained further injury during the two weeks after his elbow injury when he returned to work and strained his neck and shoulder from climbing onto locomotives while his left elbow was in a sling. Mayanrd sued Norfolk and Western for damages under the Boiler Inspection Act, 45 U.S.C. § 23, * and under the Federal Employer Liability Act (FELA), 45 U.S.C. § 51. The district court dismissed the Boiler Inspection Act claim on Norfolk and Western's motion for summary judgment because the locomotive was not "in

use" when Mayanrd hut his elbow. Following a jury trial on the FELA claim, the jury rendered a verdict in favor of Norfolk and Western. Maynard contends that the district court erred both in ruling as a matter of law that the locomotive was not in use and in instructing the jury on the FELA claim. He also contends the jury's verdict was against the weight of the evidence. We disagree and accordingly affirm.

The Boiler Inspection Act provided at the time of this incident:

> It shall be unlawful for any railroad to use or permit to be used on its line any locomotive unless said locomotive, its boiler, tender, and all parts and appurtenances thereof are in proper condition and safe to operate in the service to which the same are put, that the same may be employed in the active service of such railroad without unnecessary peril to lee or limb, and unless said locomotive, its boiler, tender, and all parts and appurtenances thereof have been inspected from time to time in accordance with the provisions of sections 22 to 29 and 31 to 34 of this title and are able to withstand such test of tests as may be prescribed in the rules and regulations hereinafter provided for.

45 U.S.C. § 23 (emphasis added). The

Act does not impose liability on a railroad for locomotives in repair or not in use. See Angell v. Chesapeake & Ohio Ry. Co., 618 F.2d 260, 261 (4th Cir. 1980). In this case, Mayanrd had a duty to inspect the locomotive for any defects, which must be noted on Norfolk and Western's ME-60 form, as well as a duty to assure that any unsafe condition is corrected as well as a duty to assure that any unsafe condition is corrected before putting the locomotive in use. Maynard injured himself before he had even entered the cab of the locomotive. At that time, the locomotive was parked on a side track. dormant and unconnected to any cars. As Mayanrd climbed on to the locomotive, he tried to open the door to the cab with his right hand, unsuccessfully. He then tried with "full force" to open the door with his left hand, while bracing with his right hand, and strained his left elbow in the process. When that effort proved unsuccessful, Maynard went around and entered on the other side of the cab and then kicked open the stuck door from the inside. At the time of the incident the locomotive had not been inspected, the ME-60 form had not been filled out, and the locomotive had not been put into use. Accordingly, the strict liability of the Boiler Inspection Act had not yet become applicable. See Angell, 618 F.2d at 261-62 (train was in use when all servicing, maintenance, and repair work had been completed). See also Pinkham v. Main Cent. R.R. Co., 874 F.2d 875, 882 (1st Cir. 1989) (train not in use when en route for repairs); Estes v. Southern Pac. Transp. Co., 598 F.2d 1195, 1198-99 (10th Cir. 1991) (train was not in use for purposes of

Safety Appliance Act because the injury occurred during a predeparture brake inspection.)

On the FELA claim, Maynard contend that the district court erred in refusing to instruct the jury as he requested. While the court did not instruct the jury exactly as Mayanrd had requested, it adequately covered the subject matter in its own form of instructions. Maynard id not entitled to have his form of jury instruction given to the jury so long as the district court adequately instructed on the law with respect to the issues properly submitted to the jury. See e.g., Chavis v. Finnlines Ltd., O/Y, 576 F.2d 1072, 1076 (4th Cir. 1978) (Affirmance of the district court is required as long as the instructions, taken as a whole, fairly and adequately state the pertinent legal principles). Moreover, we note that several of the requested instructions related to damages were rendered moot by the jury's verdict for the defendant.

Finally, Maynard contends that the district court should have granted his motion for a new trial because the jury's verdict was against the clear weight of the evidence on Norfolk and Western's negligence in allowing Maynard to use a locomotive with a defective door and in allowing him to return to work with his elbow in a sling. We reject this contention. Nov evidence was presented showing prior knowledge by the railroad that the door was stuck, and Maynard's return to work was entirely voluntary, following advice from his personal doctor.

The district court acted well within its discretion in refusing to disturb the jury's verdict.

AFFIRMED

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ABINGDON DIVISION

JAMES B. MAYNARD

Plaintiff,

v. CIVIL ACTION NO. 92-0163-A

NORFOLK AND WESTERN RAILROAD COMPANY

Defendant.

DEFENDANT'S MEMORANDUM IN SUPPORT OF ITS MOTION FOR PARTIAL SUMMARY JUDGMENT AND IN OPPOSITION TO PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

ARGUMENT

1. THERE WAS NO VIOLATION OF THE BOILER INSPECTION ACT BECAUSE THE NORFOLK AND WESTERN ENGINE WAS NOT "IN USE ON ITS LINE" AT THE TIME OF THE ACCIDENT.

The Boiler Inspection Act provides as follows:

> It shall be unlawful for any railroad to use or permit to be used on its line any locomotive unless said locomotive, its boilers, tender, and all parts and appurtenances thereof are in proper condition and safe to operate in the service to which the same are put, that the same may be employed in the active service of such railroad without unnecessary peril to life or

> limb, and unless said locomotive, its boiler, tender, and all parts and appurtenances thereof have been inspected from time to time in accordance with the provisions of this Act and are able to withstand such test or tests as may be prescribed in the rules and regulations hereinafter provided for.

45 U.S.C. 23.

In Estes v. Southern Pacific Transportation Co., 598 F.2d 1195 (10th Cir. 1979), the plaintiff was injured while attempting to move a locomotive from a service track. Specifically, Estes was pushing down on a door handle of the engine when he turned to look back over his left shoulder and injured his back. Estes could not remember where he had been told to move the locomotive, but evidence presented at trial established that the engine could have possibly been moved to the main line or moved out and tied into a run through train, among other destinations. A

roundhouse foreman testified that locomotives not scheduled to be held for repair were placed on the service tracks. Upon the facts presented, the District Court directed a verdict in favor of the defendant railroad on Estes' Boiler Inspection Act claim.

In affirming the decision of the trial court, the Tenth Circuit Court of Appeals addressed the question of whether the involved engine was being "used on its line" at the time of Estes' injury. The Court reviewed the legislative history of both the Safety Appliance Act and the Boiler Inspection Act, noting with interest the fact that Congress employed the words "used on its line" rather than using the words "interstate commerce" as it had done so in the Safety Appliance Act. the Court determined that "used on its line" under

the Boiler Inspection Act was intended to mean used in moving interstate or foreign traffic. Accordingly, the Tenth Circuit held that, at the time of the incident at issue, the locomotive unit was not engaged in moving interstate or foreign traffic and was, therefore, not in use on the railroad's line for purposes of the Boiler Inspection Act.

In 1980, the United States Court of Appeals for the Fourth Circuit described the argument made by the railroad in Estes as "persuasive." Angell v. Chesapeake and Ohio Railway Co., 618 F.2d 260 (4th Cir. 1980). Although the Fourth Circuit found the Boiler Inspection Act to apply in Angell, the facts are different from those of the present case.

In Angell, the plaintiff was helping switch engines when a blast of air from a

defective air brake valve damaged his right ear. The incident tool place after the locomotive in question had been serviced and was in the process of being moved along with another engine to a nearby track where they both would become part of a group of engines used to pull a train later that evening. Angell was uncoupling two engines and had just turned the air brake exhaust valve prior to separating the air hoses when eh was injured by the blast of air.

In distinguishing the cases cited by the railroad in support of its argument that the engine was not "in use on its line" (including the Estes case), the Court noted that all servicing, maintenance, and inspection work had already been performed and that the engine was in the process of being moved to its place in the "consist"

(group of engines). As stated by the Court:

> The present case involves an injury occurring after (inspection, repair, or servicing of railroad equipment located at a maintenance facility) have been performed and during the uncoupling of a "readied" engine in preparation for moving it to a nearby track to pull a train a few hours later. (Emphasis in the original.)

Angell, 618 F.2d at 262.

The Court stated further:

> Although the engine may not actually be engaged in moving interstate commerce, the intent of the statute is to exclude from its coverage only such functions as are necessary to detect and correct those defective conditions for which absolute immunity will be imposed.

Id.

The undisputed facts of the present case demonstrate that the involved locomotive was not being used to move interstate or foreign traffic at the time of the plaintiff's claimed injury on November 1, 1990. Rather, it was parked by

itself and idle on a spark track when the plaintiff tried to enter the unit and found the door was stuck. Under normal procedure, the unit was to be inspected by Maynard before being placed in use. (See Stepp affidavit.) Accordingly, at the time Maynard was injured, the locomotive was not "in use" on Norfolk and Western's line and was, therefore, outside the scope of the Boiler Inspection Act. Accordingly, the Court should grant summary judgment to Norfolk and Western on plaintiff's Boiler Inspection Act claim in Count I.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTER DISTRICT OF VIRGINIA
ABINGDON DIVISION

JAMES B. MAYNARD,

Plaintiff

v. CIVIL ACTION NO. 92-0163-A

NORFOLK AND WESTERN RAILWAY COMPANY,

Defendant

PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT

Plaintiff, by counsel, pursuant to Rule 56 of the Federal Rules of Civil Procedure, responds to Defendant's Motion for Partial Summary Judgment and submits the following facts and argument for the Court's consideration:

FACTS

On November 1, 1990, Plaintiff was employed by Defendant as a locomotive engineer. After reporting for work

Plaintiff went to his assigned engine at approximately 2:20 a.m., and attempted to enter the locomotive cab through the door on the short hood end. Plaintiff intended to start the engine after entering the door. (Plaintiff's deposition at p.15 and Plaintiff's Affidavit). The door would not open. (Plaintiff's deposition at 15). When Plaintiff tried to pull the door open, he was injured. Id. Plaintiff, his supervisor, and other Norfolk and Western employees examined the door thereafter and found that the door was bent and didn't fit like it was supposed to; that the gasket around the door was cracked and badly worn, which caused the door to wedge tight; that the door would not open properly; that it was not usable; and that it had to be taken out of service because it might hurt somebody. (Please see Plaintiff's Motion

for Summary Judgment and Brief in Support).

Plaintiff was assigned to take his engine to meet a train in Cedar Bluff, Virginia, and push the train consisting of engines and empty coal cars over a mountain so that the train crew could deliver the empty coal cars to a mine in Wyatt, West Virginia.

Plaintiff turned in ME-60 reports regarding the condition of the equipment on his engine after his tour of duty. (Plaintiff's deposition at p.28).

The spark track at Richlands, Virginia is not a part of a maintenance facility and is not used for service, repair and/or inspection of engines by car inspectors or carmen. There are no service or repair facilities in Richlands, Virginia. Engines are inspected, repaired and readied for use in Bluefield, West Virginia, and are then

brought to Richlands, Virginia and other location for their use. (Plaintiff's Affidavit).

On November 1, 1990, Plaintiff had no other engine to sue for his tour of duty. (Plaintiff's affidavit).

ARGUMENT

The Defendant has failed to show specific facts which would indicate that there is a genuine issue with respect to a material fact in this case, namely, whether the door to engine 3218 was defective and unsafe in violation of the Boiler Inspection Act and such violation resulted in injury to the Plaintiff.

1. Defendant cites Estes v. Southern Pacific Transportation Co., 598 F.2d 1195 (10th Cir, 1979) and Angell v. Chesapeake and Ohio Railway Co., 618 F.2d 260 (4th Cir., 1980) to support its argument that at

the time Plaintiff was injured, his locomotive was not "in use" on Norfolk and Western's line and was, therefore, outside of the scope of the Boiler Inspection Act.

The Court in Angell observed that Estes was not dispositive of the factual situation before it and as such, Estes is not applicable in this case. The Court, in Angell, recognized that the focus of its attention was not on whether the engine was actually engaged in moving interstate or foreign commerce at the time the plaintiff was injured, but whether plaintiff's injuries "directly resulted from the inspection, repair, or servicing of railroad equipment located at a maintenance facility." Angell, 618 F.2d at 262 (emphasis added). The Court, in Angell, found that the Boiler Inspection Act applied where an injury occurred "after

these excluded activities had been performed and during the uncoupling of a 'readied' engine". Id.

Given the Court's rulings in Angell, it is clear that James Maynard's injury falls within the scope of the Boiler Inspection Act. On November 1, 1990, Mr. Maynard attempted to enter the cab of the engine to start his engine. Engine 3218 was an engine which was ready for service and was not housed at a maintenance facility. Engines such as 3218 are inspected, repaired and maintained in Bluefield, West Virginia, and are sent to locations such as Richlands, Virginia for use. Mr Maynard was injured after these activities had taken place and when he attempted to enter a readied engine.

James Maynard was not a car inspector or carman and he was not inspecting the

engine at a maintenance facility. When he was injured, Mr. Maynard was attempting to enter the engine to start the engine. He was not inspecting the door. Defendant has argued that Mr. Maynard had to make a general inspection of the engine prior to taking it out of the spark track. Although Plaintiff may have had this responsibility, his duties did not somehow make his act of opening the door an inspection. It is important to remember that Mr. Maynard turned in his ME-60 reports after his tour of duty, not before, and that there were no carmen or a maintenance facility at Richlands to make repairs.

2. Defendant has failed to provide this Court with specific facts which show that the engine door was not "unsafe." The facts as presented by Plaintiff in his Motion for Summary Judgment show that the

door was not functioning properly because it was damaged and defective, and that it had to be taken out of service because it might hurt somebody. There is no dispute about these facts. Defendant has not shown specific facts which would allow a reasonable jury to find otherwise. the fact that Plaintiff pulled on the door, rather than walking around to the other door does not erase the testimony which is already before the Court which clearly shows that the engine door was unsafe and defective in violation of Boiler Inspection Act and that such violation caused injury to the Plaintiff.

2. In response to Defendant's Motion for Summary Judgment, with respect to the Safety Appliance Act claim in Count I of his Complaint, Plaintiff states that he does intend to pursue a Safety Appliance

Act claim under Count I of his complaint.

CONCLUSION

Plaintiff requests that its Motion for Summary Judgment Boiler Inspection Act claim in Count I of his Complaint be granted and that Defendant's Motion for Partial Summary Judgment on that claim be dismissed.

JAMES B. MAYNARD

By: _____
Counsel

Otis K. Forbes, III
WILSON & HAJEK, P.C.
1294 Diamond Springs Road
Post Office Box 5369
Virginia Beach, Virginia 23455

CERTIFICATE

I hereby certify that a true copy of the foregoing was mailed and faxed to all counsel of record this 30th day of December, 1993.

_____
Otis K. Forbes, III

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ABINGDON DIVISION

JAMES B. MAYNARD,
Plaintiff

v.

CIVIL ACTION NO.
92-0163-A

NORFOLK AND WESTERN
RAILWAY COMPANY,

Defendant

AFFIDAVIT

I, James B. Maynard, make the following Affidavit based upon my personal knowledge and certify that I am competent to testify to the matters stated herein:

1. The spark truck at Richlands, Virginia is not used for the repair, maintenance or inspection of engines. There are no repair facilities or maintenance facilities at Richlands, Virginia. Engines are inspected, repaired and readied for use in Bluefield, West Virginia, and brought to Richlands, Virginia for their use.

2. When I mounted Engine 3218 at approximately 2:20 a.m. on November 1, 1990, I attempted to open the door at the short head end of the engine to get to the console and start the engine so that I could go to Cedar Bluff, Virginia, meet with a train of empty coal cars and push those cars and engines over the mountain so the other train could deliver the empty coal cars to a mine in Wyatt, West Virginia.

3. Reports that I filled out regarding equipment on my engine were turned in after my tour of duty.

4. On November 1, 1990, I had no other engine to use other than 3218, and there were no car inspectors or carmen present to repair the defective door.

_____
James B. Maynard

Subscribed and sworn to before me this

_____ day of January, 1994, by James B. Maynard.

_____
Notary Public

My Commission Expires:

_____

Q But you did say skeptical, also?

A Yes, because I only see them one time, so certainly one had to be skeptical enough to prove or try to disprove their symptoms and honesty on that visit.

MR. FORBES: Thank you.

MR. MASSIE: No further questions.

THE COURT: Do you have another witness?

MR. MASSIE: Defendant rests.

THE COURT: Any rebuttal?

MR. FORBES: No, Your Honor.

THE COURT: Both sides rest. Court will remain in session. The jury will go out at this time. Ladies and gentlemen, we'll be approximately a half hour or so before we begin closing arguments, so you'll be at ease in your

jury room for awhile.

(The jury retired to the jury room.)

THE COURT: All right, gentlemen. We're going to go on the record here. I'll first hear any motions you have and in the meantime the clerk is handing you a proposed form verdict, but we'll get to that in a minute. So, at this time, put any motions on the record.

MR. FORBES: Your Honor, plaintiff would briefly like to renew his motion for summary judgment on the Boiler Inspection Act claim. The plaintiff believes it's given sufficient evidence to the Court to show that there is not a genuine issue of material fact in this case, namely whether Jim Maynard was injured on a door which was defective and unsafe. Again, we don't believe that the defendant has shown specific facts which

would negate that, and again, we renew our motion for summary judgement on that part of our claim. Thank you, your Honor.

THE COURT: Overruled.

Q All right, sir. When you report to work, are you assigned a certain job?

A Yes, sir.

Q Are you also assigned a certain engine that you have to work with?

A Yes, sir.

Q Where were you working in the latter part of 1990, Ben?

A Richlands, Virginia

Q What type of jobs were you doing?

A I was on a mine run, a shifter, that would deliver empty coal hoppers to mine operations and pull the loads away from the operation.

Q By the loads you mean the coal cars that were full of coal?

A Right. Delivering the empties and they'd fill them up and we'd pull the loads.

Q Where did you report to work?

A Richlands, Virginia.

Q In Richlands, Virginia are there any repair facilities there?

A No, sir.

Q Okay. Do you know where the engines are repaired?

A The repair work is mostly done in Bluefield or Roanoke, I think.

Q And when the engines are repaired in Bluefield or Roanoke, what happens to the engine?

A Well, they take them in, whatever it is that needs repairing, you know, if they can't repair it in Bluefield, they normally send them on to Roanoke.

Q And then how do they get to where they're, to you?

A Well, a crew, a pull crew will set engines off, or a crew, I might report to

Bluefield, which I'm working out of Bluefield now, and get unites out of Bluefield and tat them and leave them in Richlands.

Q Okay. Do you recall being assigned to an engine 3218 sometime prior to November 1 of 1990?

A Yes, sir.

Q Do you recall what day that was?

A Well, October 31.

Q And where did you have that engine, Ben?

A I got on it in Richlands, Virginia when I reported. We went to Amonate, Virginia that day to work the mines.

Q Do you recall having any difficulty with that engine on October 31, 1990?

A Yes.

Q What difficulty did you have with it?

A Opening the door into the cab

department from where I controlled the engine.

Q Okay. Do you remember which door it was that you had trouble with?

A Yes, sir.

Q Which door was that?

A It was the door going into what we called the short hood end.

Q I'm going to show the ladies and gentlemen, and hopefully you, a picture of a railroad engine. I want you to show them, if you can, show the witnesses, the jury, if you can, what door you're talking about.

A This door right here.

Q Okay. Tell the ladies and gentlemen of the jury what problems you had with that door.

A Getting it to open.

Q What did you do when you found that

you had difficulty with the door being open?

A Well, once I did get it open and got inside, and then went through the units and inspected them, my job the rest of the day was in the locomotive compartment. The brakeman would come, the brakeman or conductor, if they come in, that short hood is the easiest end to come in because you don't have to walk down that long runway, platform. I would sit there and have to put my foot on the door handle and hold the door handle down and haul off and kicked the door to get it to open.

Q When you first encountered trouble with the door, were you on the outside of this engine?

A We I on the outside?

Q Yes, sir.

A Yes, sir. I went up the short, the

steps there and went to that door, and then had a read hard time getting the door to open.

Q Did you pull on the door?

A Oh, yes, yes, sir.

Q All right. When you kicked the door open when you got inside, did you get a chance to look at the door?

A Yes, sir.

Q What did you see?

A Well, I see where the door when it shut, when it would close was coming too far in past where it was supposed to stop. It was coming too far in, and then on the inside it was where somebody had taken some instrument and done some beating on the door.

Q All right, sir. Have you seen doors like this before?

MR. MASSIE: Objection, unless it

pertains to this unit.

THE COURT: Overruled.

BY MR. FORBES (Resuming):

Q Have you seen doors in this condition before, Mr. Burnette?

A Not this bad.

Q The condition of the door you saw on October 31, 1990 is that something that occurs over time in you experience?

A Yes, sir.

Q Did you report the door?

A Yes, sir.

Q And I don't know if the ladies and gentlemen of the jury know, but what do you mean by reporting the door?

A We have a work report called an ME-60 report that when I get on a set of units or unit, I'm supposed to inspect those units and any, well any mechanical problems I'd have during my tour of duty, or anything

with the equipment that's not right or so, I have to put it on the ME-60 form, and I made the report on this ME-60 form about this door on the unit.

Q Why did you report the door on the unit?

A It was hart to get open. Anything that you find on the units that are, like I say, if they're not operating right you're supposed to report it on these ME-60 forms.

Q Did you have an opinion whether the door was safe to operate at this time?

MR MASSIE: Objection, conclusion.

THE COURT: Sustain the objection.

BY MR. FORBES (Resuming):

Q Do you know what happens to these reports, Mr. Burnette?

A Well, in Bluefield where there's work

forces, round house for men, they will usually take these reports off the engines and see what's wrong with it and have it repaired. I believe it goes to what they call the master mechanic's office, and he is supposed to check it, too, to see any repairs are done to them.

Q And which engine did you have?

A It was a 3218.

Q I'd like you to take a look at a picture of an engine that's been shown to the ladies and gentlemen of the jury, and ask you if that appears to be a similar type of engine the one that you were operating on the day that you were injured.

A Similar.

Q All right, sir. Same body type?

A Same body type. It thing the hand brake right here, I think, on 3218 was on the front of the engine.

Q The long hood?

A I think it was, yes, sir.

Q All right. But as far as the location of the door and the steps and so forth, that's substantially similar to the engine you had?

A Right.

Q All right. Thank you, Jim. Where did you report, Jim?

A I reported to Richlands. Virginia.

Q Did you report to a yard office or something like that?

A Yes, I did.

Q Where was engine 3218 located?

A It was on the, we call it the spark track. It's a holding track for these engines.

Q Are there any repair facilities there in Richlands?

A No repair facilities. If engines are to be repaired, they're taken to Bluefield or Roanoke.

Q Would there have been any carmen assigned to that area at that time?

A Not Richlands.

Q Were there any other engine located

there at that time?

A Not, no.

Q How was the lighting that evening?

A It was fairly dark. It was just, we had the reflective light form across the street and light form the back of the yard office.

Q Once you received your assignment and so forth, tell the ladies and gentlemen of the jury what you did when you mounted this engine.

A Well, I mounted the engine, and we always reached to open the door, and I reached up to open the door and twist it, and when I twisted and pulled, the door wouldn't open, and I gave it just a normal twist and pull. So, in order to, I knew it was going to take some force, so I turned around and I had, there's a grab iron, a railing, and I put my hand on that, and I

reached with my left hand and took the handle, and I pulled it and jerked it at the same time with a great deal of force. And then at that time, I had a , like an electrical shock and just went straight up into my neck, across my elbow and my fingers tingled.

Q Just so we're clear, if you and for everybody, could you, we've got a picture of a railroad locomotive here, Mr. Doss. Where is the short hood end?

A This is the short hood door here on the short end of the engine here.

Q All right sir. Did you have an occasion to look at that door?

A Yes, sir, I did. After we got through delivering the empties, I got up on the engine to get ready to go back to the head end, that's to the west end of Wyatt there to get back on our train, and Mr. Maynard, he picked up me, and also the brakeman, and took us back over tot he head end. When I got up on the engine that's when he first mentioned it to me about hurting his arm. I stared to get up on the short hood lead. So, I got up on the hood lead and that's

when he was telling me about the door.

Q Mr. Doss, did you try to open the door on the short hood lead?

A Yes, sir, after I got in there I tried to open the door and it wouldn't open, and I had my flagman, brakeman, Harris, to turn the handle in an open position, and then I put my foot against it and it wouldn't come open, and I kicked it a couple of times, and it finally did come open.

Q When the door came open what did you see about the door?

A The door had been sprung previously to that time, and it had been sprung and looked like where somebody had been banging on the door with some object or another trying to open the door before.

DIRECT TESTIMONY OF RONALD TESTER

Q On November 1, 1990 were you asked to inspect engine 3218 for a door problem?

A Yes, sir.

Q Who asked you to do that?

A It was either Mr. Freddie Stepp or our car foreman, Paul Dupree (phonetic) from Carbo.

Q Did you actually go and make the inspection?

A Yes, we did.

Q About what time did you get there on November 1?

A Approximately 1:30 or 2:00 in the afternoon.

Q Who was there when you got there?

A Mr. Stepp was there.

Q Did anybody go with you?

A Yeah. Another carman, Steve McGlothlin.

Q Were you told that there had been an injury involving that door?

A I believe we were told that there had been an injury, but I can't remember who told us that, whether it was another engineer or who told us, but seems to me we were told that.

Q Which door did you examine?

A It was the short hood lead door.

Q Was there a problem with that door?

A Yes.

Q And why kind of problem was it?

A The door would stick, when you shut the door. It would just lock up. When you tried to open it, it was real hard to o.....get open.

Q Was it working properly?

A No.

Q What did you do with the door when you found out it wasn't working properly?

A We locked it shut, taped bad order tags, orange tags to the glass on the inside and out, and wrote on them do not use.

Q Why did you do that?

A Just so no one would use it.

Q Were you able to find out what was causing the doors to stick like that?

A Yeah. From what we could tell, the rubber seal in the door was bad. When you shut the door, when you slammed the door shut, it was, it would make it wedge very tight. Instead of just closing flush, it would wedge into it.

Q Does a rubber seal like that go bad over night?

A No, I wouldn't think so.

Q Does it take a long time to develop that kind of a condition?

A I would say.

Q Now, should the seals be replaced when they go bad like that?

A Sure.

Q Now when you saw that his was the problem and you bad ordered the door, did you do anything beyond that?

A No other than lock the door and put the orange tags on it.

Q You went around the long hood end and went into the other end of the engine. What did you do when you got into the cab?

A I sat down in the engineer's seat and I turned around and took the handle, and then I gave the door a kick, actually with both feet, and opened the door.

Q Did you get a look at the door when you got it open?

A After I started the engine and got the lights on I did.

Q All right. And tell the ladies and gentlemen of the jury what the door looked like.

A Well, it had the top, it had been beaten, looks like with a hammer or whatever, and the door was, had come to the inside of the facing. There was like a wedge that started outside and came down

here to the handle.

Q Did you notice anything about the sealing on the door?

A I really didn't pay any attention to the sealing because I saw the way the door was beat up, and everything, and the way the thing had been wedged inside I didn't pay any attention to the sealing.

Q Jim, in your experience is that the kind of condition of a door that, in your experience, happens overnight?

A No, it doesn't.

Q Had you been on that unit before?

A Not the 3218 that I recall.

Q All right. There's been some testimony the railroad has admitted the door has been reported. Did you know the door had been reported?

A No, I didn't.

Q Did anybody tell you about the

condition of the door prior to you getting on it on November 21, 1990?

A No.

Q Do you know of any reason why they couldn't have told you about the door when they called you to work?

A The engine shouldn't have been there. It should have ben in Bluefield for repair when it was first reported.

Q Jim, did you ever use your shoulder to open that door at any time?

A No, I didn't.

Q What did you do after you got the door open?

A Well, I got the engine ready, and I think I contacted the dispatcher or I had the signal to come off the spark track to go up into the siding to go to Cedar Bluff.

Q Well, why did you leave if the door was in such a condition like that?

A Well, I knew that at that time, well, there was nobody around to repair it, nobody to, no repair facilities, and it would have delayed a crew for a long time to have called someone from Bluefield, and also I was there to warn anybody in case somebody tried to use the door until I got back. Mr. Stepp wasn't there at that time. He was the trainmaster.

Q All right. Did you report, did you report your condition to the dispatcher?

A On the way back to Richlands I reported it, I called the dispatcher and I told him that I had a problem with the door, and I'd like for Mr. Stepp to meet me there at the yard office so he could inspect the engine and make the decision as to what to do.

Q Who was Mr. Stepp?

A Mr. Stepp is sitting over here. He's

the yardmaster at Richlands.

Q What happened when you returned to Richlands?

A They had me lined up to go in on the , they told me to get in on the spark track where i got the engine previously, and go to the yard office and wait for Mr. Stepp because he hadn't arrived yet.

Q All right. Did you go -- what else did you do while you were in Richlands?

A I talked to the dispatcher, and he told me that they were going to relieve me and take me to the hospital because I had been injured.

Q Did you have any quarrel with that?

A No.

Q How was your arm doing at that time?

A It was still sore.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ABINGDON DIVISION

JAMES B. MAYNARD
Plaintiff,

v. CIVIL ACTION NO. 92-0163-A

NORFOLK AND WESTERN RAILWAY COMPANY,

Defendant.

PLAINTIFF'S MOTION TO SET
ASIDE THE VERDICT AND TO GRANT
A NEW TRIAL AND BRIEF IN SUPPORT

II

The Court committed error in denying plaintiff's Motion for Summary Judgment and in granting defendant's Motion for Partial Summary Judgment with respect to the Boiler Inspection Act claim in Count I of the Complaint.

Prior to the trial of this case, plaintiff filed a Motion for Summary Judgment with respect to the BIA claim in Count I of the Complaint. Plaintiff shoed that there was no genuine issue as to whether the door to engine 3218 was defective and unsafe and that such violation of the Boiler Inspection Act

caused injury to the Plaintiff.

Defendant filed a Motion for Partial Summary Judgment in response and argued that Defendant's engine was not "in use" at the time of his accident because he was inspecting the engine when he opined the door. This Court denied plaintiff's Motion for Summary Judgment, granted plaintiff's Motion for Partial Summary Judgment and ruled that the engine was not ready for use because plaintiff has the responsibility of inspecting the engine before leaving the yard and would have also been responsible for reporting a defect prior to leaving.

Plaintiff respectfully requests that the Court reconsider its ruling with respect to plaintiff's Boiler Inspection Act claim of Count I of the Complaint. The facts which are presented to the Court by plaintiff's Motion for Summary Judgment, in

his reply to defendant's Motion for Partial Summary Judgment, and during the trial of this case clearly shows that engine 3218 was "in use" when plaintiff attempted to take the controls on November 1, 1990.

The fact that plaintiff had the responsibility of inspecting the engine did not take the engine out of "use". Plaintiff testified by affidavit and during the trial that if he found a problems with this equipment that he turned in his report after his run. There were not other engines for him to use and their were no carmen available to repair the engine. The spark track in Richlands, Virginia was not a part of the maintenance facility but was used to park engines which were ready for use. The engine was not withdrawn from service and taken out of use until after plaintiff's injury.

This Court has taken a restrictive view of whether an engine is "in use" for purposes of the Boiler Inspection Act. The Court in Angell warned that such a restrictive view should not be taken. In Angell, the plaintiff was injured after an engine had been repaired at a maintenance facility and during the uncoupling of that readied engine. Defendant argued that such activity was excluded from Boiler Inspection Act because the railroad officials did not consider that an engine was "in service" until the engine had been "okayed" by the mechanical department and a crew had been "called" to the train. The Court found that such an argument would exclude any activity occurring between servicing and preparing the engine up until the time the engineer takes controls and ruled that such an interpretation would

contravene legislative purpose behind the Boiler Inspection Act. The Court thereby found that such activities were included in the Boiler Inspection Act. Angell 618 F.2d at 262. Clearly the court's findings in this case are in error given the Fourth Circuit's ruling in this case are in error given the Fourth Circuit's ruling in Angell. Plaintiff's injury clearly occurred after the engine had been serviced at a maintenance facility and when he was attempting to take the controls of a "readied" engine. His act of opening the engine door clearly fell within the coverage of the Boiler Inspection Act.

Because of the court's rulings, the jury was improperly and incompletely instructed as to the applicable theories of law in this case. Their verdict was therefore made in error. Plaintiff

respectfully requests that this Court reconsider its rulings with respect to the Boiler Inspection Act claim in Count I of the Complaint, set aside the jury verdict with respect to Count I of the Complaint, and order a new trial whereby plaintiff will be allowed to pursue Count I of the Complaint under the Boiler Inspection Act and Federal Employers' Liability Act.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ABINGDON DIVISION

JAMES B. MAYNARD
Plaintiff,

v. CIVIL ACTION NO. 92-0163-A

NORFOLK AND WESTERN RAILWAY COMPANY,

Defendant.

NORFOLK AND WESTERN RAILWAY COMPANY'S MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION TO SET ASIDE THE VERDICT AND TO GRANT A NEW TRIAL

B. THE COURT WAS CORRECT IN ITS DECISION WITH RESPECT TO THE PLAINTIFF'S BOILER INSPECTION ACT CLAIM.

The plaintiff also complains of the Court's decision on the cross motions for summary judgment holding that the Boiler Inspection Act does not apply. This issue was fully briefed and argued before trial, and the Court correctly held that the engine was not in use on Norfolk and Western's line at the time of the accident. The plaintiff presents no new authorities on this question, but merely repeats the

same arguments that the Court previously considered and rejected. The Court's decision on the applicability of the Boiler Inspection Act was plainly right, and the plaintiff's motion to reopen and reargue this matter should be denied.

The relevant evidence pertaining to the plaintiff's Boiler Inspection Act claim, in the form of pre-trial affidavits, is undisputed. The plaintiff reported to work at r about 2:25 a.m. on November 1, 1990. His assigned engine for that day sat "cold" and by itself off the main railroad line on a "spark track" at the Richlands yard. A spark track is a place where locomotives are parked when non in use. The plaintiff like other engineer beginning their shift, was supposed to inspect the unit before taking it out on the line. The plaintiff had not completed his inspection

when the accident occurred. And, at the time of the alleged injury, the unit was neither in use, nor ready for use on the railroad's line.

Angell is again cited by the plaintiff as authority for application of the Boiler Inspection Act to Count I of his Complaint. Again, however, such reliance is misplaced. in concluding that the Boiler Inspection Act did apply, the Court in Angell was careful to point out that "all servicing, maintenance and inspection work had already been performed and the engine was being moved to its place in the consist." Id. 618 F.2d at 261 (emphasis added). Regarding the purpose of Boiler Inspection Act, the Court also explained:

> [T]he intent of the [BIA] is to exclude from its coverage only such functions are necessary to detect and correct those defective conditions for which absolute liability will be

imposed.

Angell, 618 F.2d at 262 (emphasis added).

In the present case, the plaintiff encountered the stuck door before the engine had been fully inspected and made ready for use on Noroflk and Western's line. The granting of Norfolk and Western's motion for partial summary judgment as to the Boiler Inspection Act claim is consistent with the purpose and exclusions of the Boiler Inspection Act and falls squarely within the holding of the Angell case. Accordingly, the Court's ruling as to the plaintiff's Boiler Inspection Act claim is correct and should not be disturbed.